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Request for Comments on Discretion to Institute Trials Before the Patent Trial and Appeal Board

Comment On: PTO-C-2020-0055-0001
Discretion to Institute Trials Before the Patent Trial and Appeal Board

Document: PTO-C-2020-0055-0401
Comment from Maurice McIver

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General Comment

I am from Xeo Software. I write to note that the PTAB provides a critical tool for protecting us from some of the thousands of overbroad patents that get overasserted or threatened based on the ability to demand less than the cost of litigation in licensing fees. We are deeply concerned about the increased and seemingly politically motivated use by the Patent Trial and Appeal Board ("PTAB") of discretionary denials that leave invalid patents in force to be asserted in litigation. Shielding invalid patents from cancellation on policy grounds is the opposite of what the PTAB was created to do.

Denying challenges for an administration's particular policy goals divorced from the merits means that invalid patents remain in force and must be litigated at significant cost in district court infringement suits. This failure to consider and cancel invalid patents is one of the primary causes of the significant increase in litigation by non-practicing entities in recent months. It is also beyond the statutory authority of the PTAB to craft new rules based on the policy goals of this particular administration. Data shows the USPTO now favors these denials and is increasingly using this rule to deny institution of patent challenges, and the denials primarily benefit litigation-funded NPEs that file in the Eastern or Western Districts of Texas.

Congress and the rest of the federal government should be doing everything within their power to prevent unnecessary and abusive litigation against U.S. companies and employers, NOT inventing new ways to prevent those threatened with suit from preventing needless litigation. These denials favor the interests of speculative litigation by shell company plaintiffs that do not make anything or productively employ anyone to the detriment of the real-world manufacturers and service providers that are the backbone of the U.S. economy. They encourage parties to file first and forum shop for rocket dockets to maximize their financial leverage to settle spurious claims. These actions harm the economy and are contrary to the promise of the America Invents Act ("AIA").

Thank you very much for taking stakeholder's concerns into consideration,

Maurice McIver